UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., S & L, - vs. - AUSTRALIAN GOLD, INC., Defendant.	CIVIL ACTION NO. 05-CV-1217 (JS) (MLO)
AUSTRALIAN GOLD, INC., Third Party S & L, - vs. - LARRY SAGARIN DEP. AND JOHN DOES 1-10, Third Party Defendants.	**STATEMENT OF MATERIAL FACTS REGARDING WHICH THERE IS NO GENUINE DISPUTE PURSUANT TO LOCAL RULE 56.1**

Plaintiff S & L Vitamins and Third-Party Defendant Larry Sagarin, by and through their undersigned attorneys and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, submit the following statement of uncontested facts with citations to the record in this matter based on the pleadings, submissions of parties, testimony given in depositions and documents produced in discovery.

No citation to the record is indicated where the undisputed fact is based on an absence of proof in the record on a matter where defendant / third-party plaintiff bears the burden of proof.[1]

Local Rule 56.1 Statement

PROPOSED UNDISPUTED FACT	**RECORD SUPPORT**
1. S & L Vitamins, Inc., is a New York corporation with a principal place of business in New York.	2d Amended Answer With Counterclaims & Third Party

[1] *See*, *O'Diah v. New York City*, 2003 WL 22021921, *1 (S.D.N.Y.2003), *Universal Calvary Church v. City of New York*, 2000 WL 1538019, *13 (S.D.N.Y. 2000).

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	Complaint (“2nd Am. Ans. & Counterclaims”) at ¶ 13 of Counterclaims
2. S & L operates its retail business, located in Lindenhurst, New York and Miller Place, New York, under the name “Body Source.”	2nd Am. Ans. & Counterclaims at ¶¶ 7, 29-30 of Counterclaims
3. Larry Sagarin Dep. is an employee of S & L Vitamins, Inc.[2]	2nd Am. Ans. & Counterclaims at ¶ 9 of Counterclaims; Sagarin Dep. 36:22-24
4. Defendant Australian Gold, Inc. (“AG”) is a Delaware Corporation with a principal place of business in Indianapolis, Indiana.	2nd Am. Ans. & Counterclaims at ¶ 1 of Counterclaims
5. AG manufactures tanning lotions and other related tanning products (“AG Products”).	2nd Am. Ans. & Counterclaims at ¶ 2 of Counterclaims
6. AG owns or is the licensee of various trademarks for AG Products (“Marks”).	2nd Am. Ans. & Counterclaims at ¶¶ 2-3 of Counterclaims
7. S & L operates Internet websites at www.thesupplenet.com and www.bodysourceonline.com.	2nd Am. Ans. & Counterclaims at ¶ 7 of Counterclaims
8. S & L’s websites offers discount prices on a wide selection of premium tanning products, including those of AG.	March Opinion at 3
9. AG Products sold by S & L are authentic AG products.	March Opinion at 7
10. AG Products sold by S & L on its www.thesupplenet.com website are purchased	Sagarin Dep. 58:10-59:6, 60:2-61:2

[2] Collectively, defendants S & L Vitamins, Inc. and Mr. Sagarin Dep. will be referred to collectively herein as “S & L.” “S & L” also refers to any unknown, unidentified or purported affiliates, agents or other persons allegedly acting on behalf of S & L. *See* March Opinion at 20.

by S & L only at retail tanning salons.	
11. S & L has never attempted to purchase AG Products from or otherwise communicated with Distributors	Mercadante Dep. 101:15-17, 66:10-13; Sagarin Dep. 80:8-14
12. AG distributes its Products through independent distributors ("Distributors") whose ability to resell AG Products is limited by the terms of a "Distribution Agreement" which contains, inter alia, a counter-party limitation and a geographic limitation.	March Opinion at 3
13. The counter-party limitation provides that AG Products only be sold to "legitimate tanning salons and hair care salons that offer indoor tanning as an on-premises service and instruction on the use of AG Products." Sales by the Distributors to Internet sellers and other retailers who will re-sell the product to the general public are prohibited.	March Opinion at 3-4
14. On January 15, 2004, S & L's principals received a letter from counsel for ETS, Inc., which then owned Australian Gold, Inc., at the Body Source in Lindenhurst, New York (the "January 15, 2004 Letter").	2nd Am. Ans. & Counterclaims at ¶ 23 of Amended Answer
15. The January 15, 2004 Letter accused S & L of trademark infringement and intentional interference with defendant's contracts with its distributors in connection with S & L's sale of the AG Products and making various demanding that S & L (a) remove all references to Australian Gold from its website, (b) cease and desist from selling AG Products, and provide extensive purchase, supply and pricing information to defendant under threat of litigation.	2nd Am. Ans. & Counterclaims at ¶ 24 of Amended Answer
16. At the time of the January 15, 2004 letter, AG had no actual knowledge that S & L was purchasing AG Products from any party	Answer, ¶ 80; Hartlieb Dep. 114:25-119:13

other than a retail salon but believed this to be the case based on speculation.	
17. At the time of the January 15, 2004 letter, AG had no actual knowledge that S & L actually purchased or sold any AG products whatsoever.	Hartlieb Dep. 126:12-130:6
18. S & L responded in a letter dated January 27, 2004, representing that all S & L's purchases of AG Products were made from retailers, not distributors.	2nd Am. Ans. & Counterclaims at ¶ 25 of Amended Answer
19. There is no evidence that at the time of the January 15, 2004 letter, S & L was purchasing AG Products from any party other than a retail salon.	*No evidence*
20. There is no evidence that at the time before or since January 15, 2004 S & L or its principals or any person associated with them purchased AG Products from a Distributor.	AG's Responses to Interrogatories # 8.
21. There is no evidence that at any time have S & L or its principals or any person associated with them knowingly purchased AG Products from a Distributor.	AG's Responses to Interrogatories # 8.
22. Prior to or around the time of the filing of this Action, investigation by AG as to whether any distributors were selling or had sold AG Products to S & L did not indicate that any had done so.	Hartlieb Dep. 130:7-132:2
23. Prior to the January 15, 2004 letter, S & L had no specific notice of AG's distribution system and the existence of the Distribution Agreements.	Hartlieb Dep. 104:12-106:1
24. There is no evidence that S & L operates or at any time relevant to this litigation did operate, own, control, manager or represent a tanning salon nor that AG ever had a factual basis for its claim that S & L did so.	Hartlieb Dep. 134:6-135:7, 138:4-7

25. AG has never identified any Distributor from which S & L has at any time purchased AG Products.	Hartlieb Dep. 165:1-168:8
26. All of the Copyrighted Works set forth in AG's Seconded Amended Answer, Counterclaims and Amended Third Party Complaint ("Counterclaims") were federally registered no earlier than June, 2005.	2nd Am. Ans. & Counterclaims, Exh. B
27. AG has identified no financial damages arising from the alleged use by S & L of any of the Copyrighted Works.	Hartlieb Dep. 159:6-10
28. AG has suffered no quantifiable loss in sales by virtue of the alleged use of the Marks.	AG's Responses to Interrogatories ## 3, 21
29. There is no evidence of any consumer being confused by the use by S & L of any of the Marks.	*No evidence*
30. There is no evidence of likelihood of confusion or mistake or deception as to the affiliation, connection or association of AG and S & L or as to the origin, sponsorship or approval of the AG Products arising from S & L's use of any of the Marks.	Hartlieb Dep. 151:13-152:2; AG's Responses to Interrogatories # 3, 4
31. There is no evidence as to the distinctiveness or fame of the Marks.	*No evidence*
32. There is no evidence of AG's advertising expenditures for any of the Marks.	*No evidence*
33. There is no evidence of the selling power of any of the Marks.	*No evidence*
34. There is no evidence that the use of the Marks by S & L caused blurring, i.e., the weakening of any of the Marks through their identification with dissimilar goods.	*No evidence*
35. There is no evidence that the use of	*No evidence*

the Marks by S & L caused tarnishment, i.e., the casting of any of the Marks in an unflattering light.	
36. There is no evidence that the conduct of S & L has interfered with the relationships or prospective relationships between AG and any specific Distributor.	*No evidence*
37. There is no evidence that the conduct of S & L has interfered with the relationships or prospective relationships between AG and any specific Distributor in any financially quantifiable manner.	*No evidence*
38. There is no evidence that the conduct of S & L has affected the relationships or prospective relationships between AG and any Distributor in such manner as to cause damage to AG in any financially quantifiable manner.	*No evidence*
39. There is no evidence that S & L has conspired with a Distributor or any other person to illegally obtain AG Products.	*No evidence*
40. There is no evidence that S & L has conspired with a Distributor or any other person to sell AG Products on the Internet.	*No evidence*
41. There is no evidence that the perceived value of AG Products has remained high and sales have continued to increase as a direct result of the actions of AG alleged in ¶¶ 26 and 27 .	*No evidence*
42. There is no evidence that the reputation of the AG Products has been enhanced because they are only allegedly available to consumers in tanning salons and not in discount outlets such as flea markets, beauty stores and the Internet as a direct result of the actions of AG as alleged in ¶¶ 26 and 27.	*No evidence*
43. There is no evidence that AG Products are only available to consumers in tanning	*No evidence*

salons and not in discount outlets such as flea markets, beauty stores and the Internet.	
44. AG Products are sold on the Internet by others besides S & L.	Mercadante Dep. 108:15-109:14; 110:8-111:18; Sagarin Dep. 56:10-17; Hartlieb Dep. 40:14-41:41
45. Retail tanning salons that buy AG Products do not enter into agreements prohibiting them from selling AG Products to any person or business.	Hartlieb Dep. 54:14-55:3; 106:8-107:15
46. There is no evidence that S & L was, at the time of the filing of the Answer, aware of any agreements between AG and any of its retail suppliers that limited sales of AG Products by those retail suppliers to any person or business.	*No evidence*
47. Yucatan, Inc., whose owner is Danny Sheehan, is alleged to be an AG “Premier Salon” which was entitled to special rebate and cash back programs based on the volume of AG Products it sells through its tanning salon to tanning salon customers, in consideration for which the Premier Salon agrees to sell AG Products exclusively. Premier Salons also agree not to sell AG Products to any person who will resell them on the Internet.	Defendant’s Third Party Complaint (“Third Party Complaint”) ¶¶ 22-26
48. There is no evidence of any agreement between AG and Yucatan, Inc. or Danny Sheehan that limited sales by those retail suppliers to any person or business that was executed by Yucatan, Inc. or Danny Sheehan.	*No evidence*
49. There is no evidence that S & L was, at the time of the filing of the Answer, aware of any alleged agreement between AG and Yucatan, Inc. and Danny Sheehan that limited sales by those retail suppliers to	*No evidence*

any person or business.	
50. There is no evidence that S & L was aware of any alleged agreement between AG and Yucatan, Inc. and Danny Sheehan that limited sales by those retail suppliers to any person or business until after such time as Yucatan, Inc. and Danny Sheehan earlier than April 26, 2006.	*No evidence*
51. There is no evidence that S & L induced Yucatan, Inc. or Danny Sheehan to breach any contract between either of them and AG.	*No evidence*
52. There is no evidence that AG put S & L on notice of the identity of any Premier Salon prior to its disclosure in this litigation that Yucatan, Inc. was or is a Premier Salon.	*No evidence*
53. There is no evidence that AG put S & L on notice of the identity of any Premier Salon besides its allegation that Yucatan, Inc. was or is a Premier Salon.	*No evidence*
54. Yucatan's Distributor never explained to Yucatan that there were any restrictions on whom AG Products could be sold to by Yucatan.	Sheehan Dep. 33:19-22
55. Yucatan was a significant source of AG Products for S & L.	Sheehan Dep. 39:3-40:14; 41:20-44:18
56. Yucatan never attended regional training meetings or knew of them.	Sheehan Dep. 26:10-18
57. Yucatan, Inc. never received the AG training materials.	Sheehan Dep. 26:7-9
58. Two AG employees have training responsibility for its worldwide sales.	Hartlieb Dep. 163:7-164:5
59. S & L never communicated to Danny Sheehan that it was purchasing AG Products from Distributors and never made any effort	Sheehan Dep. 61:18-63:10; 69:8-70:12

to hide its sources of AG Products from Danny Sheehan.	
60. The purpose of SPF's in tanning products is to protect users from harmful ultraviolet rays during tanning.	Hartlieb Dep. 21:8-12
61. AG sells tanning products to the general public that are for outdoor use and which do not contain any Sunscreen Protection Factor ("SPF").	Hartlieb Dep. 19:12-21
62. AG has no policy restricting the age of persons who may purchase AG Products.	Hartlieb Dep. 25:13-17:24
63. AG does not employ a person on its staff of over 80 people with full time responsibility for product or customer safety.	Hartlieb Dep. 36:16-38:12
64. AG sells AG Products to persons that are not and do not operate tanning salons but own their own tanning beds at the time they establish their accounts with AG.	Hartlieb Dep. 55:25-56:24
65. The AG contract with its Distributors only requires that training with respect to the use of AG Products be available, not that end consumers are actually trained.	Hartlieb Dep. 60:5-61:22
66. AG does not examine, test or monitor Distributors to determine if they are adequately trained to advise consumers regarding the use of AG Products.	Hartlieb Dep. 62:5-63:9
67. Consumers who make inquiries directly to AG regarding the use of AG Products are routed to AG's sales department.	Hartlieb Dep. 65:24-66:18
68. Although AG has a goal that all retail tanning salons that buy AG Product from Distributors receive AG's information brochures about its products, it does not know that they do nor have any way of insuring that they do, and some retail tanning salons do not receive these	Hartlieb Dep. 66:23-67:18

brochures.	
69. AG training manuals do not have a section that deals exclusively with the safety of AG Products.	Hartlieb Dep. 72:4-25
70. AG has no way of knowing how retail salons actually interact with customers and if they offer or provide any safety information or training whatsoever.	Hartlieb Dep. 155:7-156:19
71. Among the AG Products are “Tingle Products” that contain the chemicals Benzyl Nicotinate or Methyl Nicotinate that increase circulation under the skin.	Hartlieb Dep. 70:7-71:2
72. AG does not maintain a centralized record of safety practices of tanning salons.	Hartlieb Dep. 168:14-169:1
73. Tingle products can cause a reaction in some users, but cannot cause users to get hurt.	Hartlieb Dep. 73:1-9
74. Some retail salons that buy from AG Distributors do not receive adequate training.	Hartlieb Dep. 76:7-20
75. Only one consumer has ever sued AG in connection with a reaction from a Tingle Product.	Hartlieb Dep. 77:17-20
76. The Food and Drug Administration (“FDA”) does not regulate Tingle Products as an over-the-counter drug.	Hartlieb Dep. 77:21-78:3
77. Safety information about the use of Tingle Products in AG product manuals is designated as “selling tips”.	Hartlieb Dep. 78:24-82:15
78. AG does not offer, as part of its training, a safety training class.	Hartlieb Dep. 84:8-22
79. AG does not consult with medical experts in connection with Tingle Products	Hartlieb Dep. 154:10-20

or other safety issues.	
80. The Indoor Tanning Association ("ITA") is the main trade association in the indoor tanning industry, and AG is a member of the ITA, contributes to it financially and participates in its board.	Hartlieb Dep. 152:5-153:4; 153:15-17
81. The ITA does not have any initiatives or other activities by which it educates the public in terms of the risks or danges associated with Tingle Products.	Hartlieb Dep. 153:5-13
82. AG cannot quantify its financial losses or even the general range of its financial losses as a result of the activities of S & L	Hartlieb Dep. 138:8-145:22
83. AG threatened to use litigation to "discovery the scope of" S & L's business, and intended to carry out that threat.	Hartlieb Dep. 119:24-126:11
84. There is no evidence of the use of "false pretenses" by S & L as alleged in ¶ 74 of AG's counterclaim.	AG's Responses to Interrogatories # 18.
85. AG's allegation in ¶ 96 of its counterclaim that S & L's website is "misleading in material aspects" is limited to S & L's use of the name of its website in photographs of AG products.	AG's Responses to Interrogatories # 19
86. There is no evidence of AG's income and profits from the sale of AG products in connection with the use of the Marks.	AG's Responses to Interrogatories # 20
87. All photographs of AG products used by S & L were taken by Helen Sagarin Dep. or Elizabeth Sagarin	Sagarin Dep. 51:14-52:7, 147:25-148-4
88. No photographs of AG products used by S & L were taken from the AG website.	Sagarin Dep. 52:5-53:13, 54:20-24
89. There is no evidence that S & L has intentionally induced any Distributor to breach the Distribution Agreements by	*No evidence*

ordering AG Products from "John Doe" distributors and then selling AG Products over the Internet to the general public.	
90. There is no evidence that S & L has intentionally induced any Distributor to breach the Distribution Agreements in any manner.	*No evidence*
91. There is no evidence of AG's exclusive distribution agreement with its European Distributor.	*No evidence*
92. There is no evidence that S & L has interfered with AG's exclusive distributorship relationship with AG's European Distributor.	*No evidence*
93. There is no evidence that AG has been damaged by any interference by S & L with any contract between AG and any Distributor.	*No evidence*
94. There is no evidence that AG has been damaged by any interference by S & L with any prospective business relationship or economic advantage involving AG and any Distributor.	*No evidence*

By: ______________________________

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